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IN THE

Supreme Court of the United States

October Term, 1963

No. 659

METROMEDIA, INC. (substituted for the name of METROPOLITAN BROADCASTING CORPORATION), a Delaware corporation, and PACIFIC OUTDOOR ADVERTISING COMPANY, a California corporation,

Appellants,

vs.

CITY OF PASADENA, a California municipal corporation, DON C. McMILLAN, as City Manager of said city, ROBERT McCUE, as Superintendent of Building of said city, BYRON B. GENTRY, as City Prosecutor of said city, and PAUL SHAFFER, as Planning Director of said city,

Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

JURISDICTIONAL STATEMENT.

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Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the California District Court of Appeal, Second Appellate District, entered on May 16, 1963, reversing a judgment of the Superior Court of the State of California for the County of Los Angeles declaring ordinances unconstitutional and restraining their enforcement, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below.

The opinion of the District Court of Appeal is reported in 216 A. C. A. 308; 30 Cal. Rptr. 731, and a copy is attached hereto as Appendix A. No opinion was issued by the trial court; a copy of its Findings of Fact and Conclusions of Law are attached hereto as Appendix B.

Jurisdiction.

This suit was brought to enjoin the enforcement of certain ordinances. The judgment of the Superior Court for the County of Los Angeles declaring the ordinances unconstitutional was entered on December 10, 1961. This judgment was reversed by the District Court of Appeal on May 16, 1963. A petition for rehearing was denied on June 14, 1963. A petition for hearing by the Supreme Court of California was denied on July 10, 1963. The District Court of Appeal therefore became the highest court where judgment could be had. Notice of Appeal to this Court was filed in the District Court of Appeal, Second Appellate District of California, on October 7, 1963.

Jurisdiction to review this decision is conferred by Title 28, United States Code, Section 1257(2). A municipal ordinance is a "state statute" within the meaning of 28 U. S. C. §1257(2). *King Manufacturing Co. v. Augusta* (1928), 277 U. S. 100, *Poulous v. New Hampshire* (1952), 345 U. S. 395. An intermediate appellate court is the highest state court in which decision can be had when higher discretionary review is sought and denied. *Jamison v. Texas* (1943), 318 U. S. 413, *Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock* (1929), 279 U. S. 410.

Ordinances Involved.

The ordinances of the City of Pasadena involved herein are Ordinance No. 4322, "Zoning Ordinance of the City of Pasadena," Sections 3.09(A)(3) and 4.01 (G); Ordinance No. 4487, "Sign Ordinance of the City of Pasadena, Sections 16 and 27; Ordinance No. 4495 Amending Ordinance No. 4322, Sections 5 and 9. The relevant parts of these sections are set forth in Appendix C attached hereto.

Questions Presented.

(1) Whether city ordinances, without violating the guarantee of freedom of speech and press, may prohibit the maintaining of outdoor advertising signs in commercial areas, when such signs provide a medium of public communication available not only to advertise products and services but also for the expression of political, religious and other viewpoints, and of ideas and opinions.

(2) Whether under the Fifth and Fourteenth Amendments City ordinances may prohibit without just compensation Appellants' outdoor advertising business when the Record discloses that such business is beneficial to the community and not injurious to the public in any way and that such prohibition is not reasonably related to any proper public purpose.

(3) Whether City ordinances are discriminatory and arbitrary in violation of the Fourteenth Amendment by prohibiting outdoor advertising roof top signs which are available to all desiring to communicate to the public, but permitting the identical sign if the message refers to products or services available in the build-

ing below, when the Record discloses no reasonable relationship between the distinction and any legitimate aspect of the police power.

Statement of the Case.

For many years Appellants have engaged in the business of leasing roof top space in commercial areas from building owners, erecting sign structures and selling space thereon, and displaying messages to the public. These messages primarily concern various products and services but also are available for those of a political, economic or social nature. In addition, Appellants have displayed as a public service and at their own expense, various messages of a charitable, civic, religious, safety, and cultural nature. Space on such signs is available for purchase by all persons who desire to display or communicate a message to the public. Thirty-three of such signs have been maintained by Appellants in Appellee City all located in the commercial, manufacturing and industrial areas.*

*Appellants' business constitutes a respectable and substantial part of the outdoor advertising industry in California. In 1962, the industry in California alone provided employment to some 1,500 highly skilled employees in addition to many more skilled craftsmen in affiliated and supply industries, which include printing, paint manufacture, electrical supplies, etc. Its payroll amounts to almost $10 million dollars a year. It purchases materials and supplies amounting to some $18 million dollars a year. Lease rentals to property owners amount to $5,500,000 and nearly $600,000 is paid in state and local taxes. All of these are seriously affected by the issues involved in this case. Ordinances of similar effect exist in municipalities and counties elsewhere in the State and more are under consideration. Appellants have spent $50,000 to construct it signs in Appellee City alone. Removal costs would exceed $8,000. Appellants receive $4,500 per year income therefrom. Corresponding expenditures have been made throughout the State.

In 1959 Appellee City enacted ordinances which prohibited the further erection or maintenance of such signs and required that existing signs be removed. Signs which advertised products and services available in the building below, however, were permitted even though otherwise identical.

Appellee City has not paid or offered to pay any compensation whatever to Appellants for the taking of their business or signs. Indeed no proper allowance has even been made for the reasonable remaining economic life of existing structures which the ordinances would require be removed. The Record shows that such period is at least eleven years; the ordinances provide for two [Findings of Fact Nos. 6 and 31, Clk. Tr. pp. 26, 34].

Appellees threatened to enforce such ordinances. Appellants then filed the present action to enjoin their enforcement. Appellees generally contended that the prohibition was a proper police power "regulation," that the elimination of roof signs was a reasonable zoning classification, that a "problem" existed,* and that the ordinances were a proper handling of this problem. No more specific or recognizable police power basis was advanced. After a five day trial, the trial court found no police power basis to sustain the ordinances. It found them discriminatory and invalid.

On appeal a three judge panel of the District Court of Appeal reversed the judgment of the trial court. In doing so, it pointed to no recognizable police power basis to support the ordinances but refers only vaguely

*No such problem was shown in the Record.

to undefined "economic and aesthetic considerations." (Op. p. 4.)*

Despite the importance and novelty of the questions presented by Appellants, the District Court of Appeal confined its decision to a justification of the discrimination between Appellants' roof signs and roof signs containing messages relating to products or services available in the building below. The other constitutional claims of Appellants were ignored. Instead the District Court of Appeal stated that counsel had limited its claims to this one issue, citing a colloquy between counsel and the trial judge. This colloquy actually concerned the relevance of the testimony of one witness and the issues to which that testimony was directed. It had nothing whatever to do with other issues in the case, nor was it understood by counsel for either party or the trial judge to limit in any way or isolate the issues presented.

The constitutional claims presented here were presented in full before both the trial court and the District Court of Appeal.** Nor have any of these claims been abandoned or waived. Counsel for Appellees at no time contended in any way that the issues were limited. On the contrary, counsel argued fully each of the

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*This was stated despite the fact that the Record shows that Appellants' business has substantial economic benefit without any adverse effect upon anyone or anything. There is not even a showing of any adverse aesthetic effect although at least this would appear to be necessary to provide any support at all for the Court's decision or the position of the Appellees.

**See the Opening Statement of counsel for Appellants before the Superior Court [Rep. Tr. p. 4], the Trial Briefs filed with the Superior Court [Clk. Tr. pp. 96-318, 335-342] and Respondents' Answering Brief filed with the District Court of Appeal. Copies of the Index of Issues in each brief are attached hereto as Appendix D. They clearly show that each constitutional claim presented here was presented below.

issues presented here.* Nor did the trial judge assume any such limitation since he made findings covering all issues. Nevertheless, the District Court of Appeal refused to consider these issues.

As a result of these ordinances an entire medium which is available for public expression and communication is in fact prohibited.** While principally displaying commercial messages, it is common knowledge that this means of public communication is used by political parties, political candidates, traffic safety organizations, religious, charitable, civic, cultural and non-profit professional groups, and many others to convey various ideas, concepts and opinions, some controversial, to the public.***

The outdoor advertising industry is not only a vital segment of the economy; more importantly here it is also one of the most effective media for the communication of information, ideas and opinions. Its effectiveness is enhanced because it is a relatively inexpensive and therefore more available vehicle for this purpose

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*See Appellees' briefs submitted to the District Court of Appeal.

**The effect of the ordinances is to totally prohibit not only Appellants' roof sign business in Appellee City but Appellants' surface signs as well, both of which are confined entirely to the commercial, industrial and manufacturing districts. The Trial Court found upon uncontradicted evidence that because of the decline in and unavailability of suitable surface areas, surface signs will be eliminated in approximately five years. This fact, together with the height limitations already imposed by ordinance and the complete prohibition of roof signs, constitute a total prohibition of the outdoor medium within a five-year period.

***To cite a specific example of the scope of opinion represented by such messages, one need only note that outdoor advertising media are used both by the American Bar Association in connection with Law Day to foster public respect for the courts and the rule of law and, at the other extreme, by organizations attacking and urging the impeachment of members of this Court.

than radio, television, or the press, and probably than the sound trucks of *Kovacs v. Cooper* (*infra*) or the door-to-door handbilling of *Martin v. Struthers* (*infra*). The trial court found that the outdoor medium was the most economical method of reaching the public, that newspaper advertising was 32 times more expensive and radio advertising 50 times more expensive. Thus those, such as candidates for local public office or advocates of local propositions, who perhaps could afford the outdoor medium but not the more expensive newspaper or radio advertisement, are deprived by these ordinances of this avenue to reach the public. This would also be true with those whose need to speak is perhaps less institutionalized but no less important to them or to our constitutional system.

At the same time the ordinances exempt from the prohibition and permit signs which could not provide space for this purpose. By definition the permitted signs are limited to advertising products and services located in the building below. If used for any other purpose, they would become illegal.

The evidence without significant contradiction shows, and the Findings of Fact [Clk. Tr. pp. 23-34] confirm:

1. that Appellants' business is a legitimate and useful business of economic value and advantage to the business community, consumers and the public generally;
2. that it is a proper and compatible use in commercial, manufacturing and industrial areas;
3. that it does not constitute a nuisance or adversely affect the public health, safety (including traffic safety), general welfare, morals, prosperity, comfort or interest of the public;

4. that no public need, interest or necessity warrants, justifies or requires the prohibition;

5. that the interference attempted by the ordinances is not reasonably necessary for the accomplishment of any identified public need; and

6. that Appellants' business, which has existed for many years, causes no damage or injury of any kind or nature to anyone or anything, not even to aesthetic sensitivities.*

The ordinances have as their only conceivable basis a matter of personal taste and individual like or dislike, which whatever its effect might otherwise be, must fall when confronted with the right of free speech and press. But even this undefined and illusory basis for state interference is unsupported in the Record here. Nevertheless the ordinances

1. eliminate an entire medium of public communication and expression which, though under commercial auspices, is available and used for publication of political, economic and social viewpoints and non-commercial information, ideas and opinions;

2. prohibit an entirely legitimate business without just or any compensation; and

3. discriminate by permitting an identical business upon the basis of characteristics which have no reasonable relationship to any legitimate aspect of the police power.

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*Appellants' signs were not found to be unaesthetic; on the contrary they portray art work of high standard and are well maintained. If any aesthetic problem exists it lies with the *permitted* signs and not the prohibited [Rep. Tr. p. 314].

Much litigation has resulted concerning the permissible extent of legislation affecting the outdoor advertising medium.* The instant case raises and squarely presents the issues stated here including that of free speech and press.

The District Court of Appeal did not consider the constitutional issues presented by Appellants. This Court has never permitted and should not now permit parties to be deprived of their right to have Federal constitutional claims adjudicated by such judicial avoidance. *Staub v. Baxley* (1958), 355 U. S. 313; *Allied Stores of Ohio, Inc. v. Bowers* (1959), 358 U. S. 522; *NAACP v. Alabama ex rel. Patterson* (1958), 357 U. S. 449.

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*Cf. *City of Los Angeles v. Barrett* (1957), 153 Cal. App. 2d 776, 315 P. 2d 503; *General Outdoor Advertising Company v. Goodman* (1953), 128 Colo. 344, 262 P. 2d 261; *Franklin Furniture Co. v. City of Bridgeport* (1955), 142 Conn. 510, 115 A. 2d 435; *Sunad, Inc. v. City of Sarasota* (Fla. 1960), 122 So. 2d 611; *McGuire v. Purcell* (1955), 7 Ill. App. 2d 407, 129 N. E. 2d 598; *Stoner McCray System v. City of Des Moines* (1956), 247 Iowa 1313, 78 N. W. 2d 843; *City of New Orleans v. Levy* (1953), 223 La. 14, 64 So. 2d 798; *Grant v. Mayor of Baltimore* (1957), 212 Md. 301, 129 A. 2d 363; *Grebow v. City of Baltimore* (1958), 217 Md. 333, 142 A. 2d 554; *Alper v. Las Vegas Motel Association, Inc.* (1958), 74 Nev. 135, 325 P. 2d 767; *In re Opinion of The Justices* (N. H. 1961), 169 A. 2d 762; *United Advertising Corp. v. Borough of Metuchen* (1961), 35 N. J. 193, 172 A. 2d 429, *on remand* (1962), 76 N. J. Super. 301, 184 A. 2d 441; *Schulman v. People* (1961), 10 N. Y. 2d 249, 176 N. E. 2d 817; *Ellis v. Ohio Turnpike Commission* (1954), 162 Ohio St. 86, 122 N. E. 2d 713; *Webb v. State* (1959), 217 Ore. 1, 340 P. 2d 968; *Mayor of Savannah v. Bay Realty Company* (Ga. 1954), 82 S. E. 2d 710; *Ohio Valley Advertising Corp. v. Linzell* (1958), 168 Ohio St. 259, 153 N. E. 2d 773; *Poster Advertising Company Inc. v. Zoning Board of Adjustment*, 408 Pa. 248, 182 A. 2d 521 (1962); *Ghaster Properties, Inc. v. Preston* (Ohio Com. Pl. 1962), 184 N. E. 2d 552; *National Advertising Co. v. County of Monterey* (1962), 211 Cal. App. 2d 375, 27 Cal. Rptr. 136.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.

The Ordinances Violate the Free Speech and Press Guarantees of the First and Fourteenth Amendments.

The safeguards of the First Amendment protect modern advances in means and methods of transmitting thoughts and ideas—by loud-speakers, facsimile, motion pictures, radio and television. *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U. S. 495, 502; (motion pictures); *Superior Films v. Department of Education* (1954), 346 U. S. 587, 589; (concurring opinion of Douglas, J.); *Kovacs v. Cooper* (1949), 336 U. S. 77; (sound trucks); *Times Film Corp. v. Chicago* (1961), 365 U. S. 43, 77; *Carlson v. California* (1940), 310 U. S. 106 (picket signs); *Schneider v. Irvington* (1939), 308 U. S. 147 (handbills).

> "The liberty of the press is not confined to newspapers and periodicals. * * * The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. * * *"
>
> *Lovell v. Griffin* (1938), 303 U. S. 444, 452.

The fact that commercial auspices are involved, that books may be sold, newspapers contain advertisements, and motion pictures charge admission, does not remove such media from the protection of the First Amendment. "It is of course no matter that the dis-

semination takes place under commercial auspices." *Smith v. California* (1959), 361 U. S. 147, 150. ". . . the fact that periodicals are sold does not put them beyond the protection of the First Amendment." *Breard v. Alexandria* (1951), 341 U. S. 622, 642. The guarantees apply to the advertising as well as the editorial pages of a newspaper. *Grosjean v. American Press Co.* (1936), 297 U. S. 233. The communication may be something other than the exposition of ideas; entertainment is equally protected (*Winters v. New York* (1948), 333 U. S. 507, 510).

The outdoor medium involves recognized subjects of public interest. One area concerns the nature and availability of the products and services it uses. But it is common knowledge that frequent users are also political candidates, religious advocates, proponents of political, social and economic ideas and viewpoints, often controversial, and many expressions of a similar nature. These sources purchase space, post messages and proclaim their merits and virtues to the public in the same way that a producer of products and services does. Furthermore, many public service messages containing information, ideas and opinions concerning charitable, safety, educational, civic and cultural matters, are displayed.

The outdoor medium is entitled to as much constitutional protection as exists for other forms of public communication. There is no substantive distinction in this respect between the outdoor medium and the presentations, paid for and public service, transmitted by radio and television or communicated by newspapers.

A form of outdoor advertising is the sound truck. In *Kovacs v. Cooper* (1949), 336 U. S. 77 this Court

recognized that sounds emitted by sound trucks would be objectionable to some and constitute an interference with business or social activities. Nevertheless:

> "Absolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activities." (P. 81-82.)

In *Saia v. New York* (1948), 334 U. S. 558, the Court stated that:

> "Loud-speakers are today indispensible instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. * * *" (P. 561.)

Is the outdoor advertising medium any the less an acceptable method of political campaigning? Is it any the less the way people are reached? In the extent of its use for this and similar purposes, we suggest that it exceeds the sound truck in importance. Both represent a relatively inexpensive and therefore rare means of public expression.

In *Martin v. Struthers* (1943), 319 U. S. 141, an ordinance forbidding door-to-door distribution of "handbills, circulars or other advertisements" was struck down even though there might be home occupants who resented being thus disturbed. Mr. Justice Black stated:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that,

putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. * * *

* * *

"This freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. * * *" (Pp. 146-147, 143.)

See also: *Talley v. California* (1960), 362 U. S. 60.

Again, is there any substantive difference between a handbill and the outdoor sign? Is one method of reaching the public any more important than the other?

Neither *Kovacs, Saia* nor *Martin* emphasizes the nature of the message being communicated. Indeed in *Kovacs* the Court refers to the use of sound trucks "*for advertising,* for religious exercises and for discussion of issues or controversies" (Emphasis added, p. 81). And the ordinance in *Martin* referred to "advertisements." The protections were not applied based upon the content of the message, whether commercial, political, public service or otherwise. The important element was the protection of the *means* of public communication. Freedom concerning content of the message is of course important but the right is hollow if the means of communicating it or the method of its expression to the public is interfered with or prohibited. The ordinances here have this effect.

In many areas the state may act upon the basis of legislative preferences and the existence of a "rational basis" for acting: "But freedoms of speech and of

press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *West Virginia State Bd. of Edu. v. Barnette* (1943), 319 U. S. 624, 639. See also: *Cantwell v. Connecticut* (1939), 310 U. S. 296, 304. *Shelton v. Tucker* (1960), 364 U. S. 479, 489.

Appellants of course fully recognize that as with sound trucks and picket lines, reasonable regulation of the placement of signs on a non-discriminatory basis is necessary and proper. This has been done for example in confining Appellants' business to strictly commercial areas. Methods of construction and maintenance have also been regulated in detail. However, total prohibition can hardly be called reasonable regulation.*

In *Lovell v. Griffin* (1938), 303 U. S. 444, the Court held void an ordinance requiring a license for the distribution of literature. The Court in *Saia* struck down an ordinance forbidding the use of sound amplification devices except with prior permission. The Court in *Saia* stated that both ordinances were "dressed in the garb of the control of a 'nuisance.'" [334 U. S. 558, 560]. In the instant case the ordinances are dressed in the garb of zoning. However, zoning is merely a device. Appellants' activity is already con-

*Not only is the roof sign medium prohibited—the ordinances in fact, and undoubtedly with design, destroy the entire outdoor advertising medium in Appellee City. Height limitations and the known disappearance of available surface locations, together with the ordinances involved here will produce this result. To sustain these ordinances would be to give unrestrained control to the city over an important method of public communication, including the right to prohibit it.

fined entirely to the commercial, industrial and manufacturing areas and was specifically found to be a compatible and proper use in these zones. No basis has been shown for its total exclusion.

In *Carlson v. State of California* (1940), 310 U. S. 106, this Court held unconstitutional an ordinance prohibiting the carrying of a sign in the vicinity of a place of business for the purpose of inducing or influencing persons to refrain from doing business with a designated business—the familiar union picket sign.

See also:

> *Thornhill v. State of Alabama* (1940), 310 U. S. 88, 101.

If the right to advertise by means of a picket sign for the purpose of inducing the public *not to* patronize a particular establishment is constitutionally protected, an advertising sign to induce the public *to* patronize a particular establishment should also be entitled to a similar protection. It is difficult to see how one situation or interest, in this context, is significantly more or less a commercial purpose than the other.

This Court has said that extreme vigilance should be exercised to prevent even the smallest encroachment upon First Amendment freedoms:

> "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. * * *"
>
> *Roth v. United States* (1957), 354 U. S. 476, 488.

Such vigilance was exercised in *Grosjean v. American Press Co.* (1937), 297 U. S. 233, where the Court struck down a Louisiana state tax upon newspaper *advertising* but which only applied to newspapers having a circulation of more than 20,000 copies per week. The Court recognized that newspapers were not immune from taxation but held that the direct tendency of the tax was to restrict the circulation of newspapers. The Court pointed out that if the tax were increased it might well result in destroying both advertising and newspaper circulation, stating:

> "It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid [citing cases], it well might result in destroying both advertising and circulation."
>
> *Grosjean v. American Press Co.*, 297 U. S. 233, 244-245.

The tax on commercial advertising therefore was found to adversely affect the business of publishing the newspaper itself and constituted an interference by the state contrary to the guarantee of freedom of the press. Thus regulation of commercial advertising (in the form of taxation) which supported and made possible one form of protected activity (the circulation of newspapers) was invalidated because of its adverse effect on that protected activity. Commercial advertising is necessary in order for newspapers to exist and for the freedom of press to be exercised. An undue burden on commercial advertising under these circumstances would inhibit freedom of the press.

Were it not for the messages advertising products and services, the outdoor medium would not be available for messages, both purchased and public service, which communicate ideas, opinions and information. The one and the other make up Appellants' business. The effect of state interference here is to abolish not only the advertising of products and services but the medium itself with its other forms of messages. The basis for such interference, and its effect upon freedom of speech and press, should therefore be critically viewed.

The severity of the state action in this case is aggravated by the fact that the ordinances exclude from the prohibition, signs which, by definition, can only advertise products and services available in the building below. Those who would utilize an inexpensive method of communicating to the public—to express a political viewpoint or advocate a political candidate—are foreclosed from doing so because the medium which they could afford to use has been destroyed. But even though inexpensive he could not use a permitted sign for his message. Indeed, if he should purchase space on such a sign and post his message there, the sign would then become unlawful. Where legislation has such a result and touches upon the free speech and press guarantees "... the Courts should be astute to examine the effect of the challenged legislation." (*Schneider v. Irvington* (1939), 308 U. S. 147, 161).

We urge that in this case action by the state infringes upon the constitutional guarantees of freedom of speech and press. This infringement is particularly onerous when the Record discloses that no public purpose or necessity exists for such action. But even if

there were a proper public purpose. "The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." (*Cantwell v. Connecticut* (1940), 310 U. S. 296, 304.)

II.

The Ordinances Are Invalid in That They Constitute a Taking of Property for No Proper Public Purpose and Without Just Compensation or Due Process of Law.

This Court, as recently as last year, stated that to justify the state in interposing its authority on behalf of the public, it must be shown (1) that the interest of the public required such interference, and (2) that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. *Goldblatt v. Town of Hempstead* (1962), 369 U. S. 590. In that case, the Court stated:

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. * * * There is no set formula to determine where regulation ends and taking begins. * * *
>
> "The classic statement of the rule in Lawton v. Steele, 152 US 133, 137, 38 L ed 385, 388, 14 S Ct 499 (1894), is still valid today:
>
> "'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" (Pp. 594-595.)

Neither test enunciated in *Goldblatt* is met in this case. On the contrary Appellants have affirmatively established that no interest of the public requires the city's interference and that the means are not reasonably necessary for the accomplishment of any public purpose. No injury has been shown to others if the prohibited activity were permitted. Nor here has there been the required evaluation of the effect of the prohibition upon private interests—the "taking" limitation. But the ordinance is clearly oppressive in its destruction of Appellants' business without compensation.

In *Griggs v. Allegheny County* (1962), 369 U. S. 84, the Court determined that the use by the county of the air space of property under the takeoff and approach areas used in connection with its airport, constituted an interference with the use of the owner's property and was a taking which required just compensation. Surely, if the mere affecting of the use of property under such circumstances constitutes a taking, the destruction of Appellants' roof sign business under the circumstances of this case would likewise constitute a taking and require compensation. This would be *a fortiori* because in *Griggs* at least the interference was for a recognized public purpose and the means used were reasonably necessary to accomplish that purpose. In the instant case neither has been shown.

Even assuming that aesthetics were alone a proper basis for the exercise of the police power, which we contend it is not, any *taking* for such a purpose requires just compensation. In *Berman v. Parker* (1954), 348 U. S. 26, this Court upheld the taking of property in furtherance of a plan for redevelopment

of substandard housing and bligh ed areas in the District of Columbia, but with a provision for the payment of just compensation.

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (348 U. S. 26, 36.)

See also: *Bydlon v. United States* (Ct. Cl. 1959), 175 F. Supp. 891, 900:

> "Police power may be exercised for the preservation of aesthetic values, but just compensation must be paid to the owners whose property is taken. Berman v. Parker, 348 U. S. 26. . . .* * * Aesthetic considerations have been held to be a luxury rather than such a necessity as would justify the taking of private property without compensation. * * *"

We submit, therefore, that both the Fifth and Fourteenth Amendments, placing some restraint upon state action, require for the exercise of the police power at least a showing of some public interest and necessity, and some connection between the state action and the accomplishment of that interest or necessity. Neither of these minimum requirements for the exercise of state action are present here. At the very least just compensation is required to compensate for the destruction of Appellants' legitimate and useful business.

In *Goldblatt* this Court reserved the question as to how far regulation may go before it becomes a taking (369 U. S. 590, 594.) We urge that the instant case presents a regulation that is a taking.

III.

The Ordinances Are Discriminatory and Arbitrary and in Violation of Fourteenth Amendment Requirements.

There is no reasonable relationship between the discrimination in the ordinances between permitted and prohibited signs and any legitimate aspect of the police power. Appellants' roof-sign business is prohibited but the identical roof sign so prohibited is permitted if it has reference to products and services available below—characteristics which have no police power significance. The Record shows no proper public purpose to be served by the prohibition and none can be shown. But even if there were such a purpose, there is no showing whatever that the discrimination between the permitted and prohibited signs would in any way accomplish this purpose.

One outdoor advertising sign may be legal but an identical sign would be unlawful, indeed criminal, depending upon whether it was located on a building in which the product or service advertised is available—or was located on the building next door. A single sign could be lawful or unlawful depending upon what its message from time to time contained. Thus, if it advertised Coca Cola and Coca Cola were sold below, it would be lawful. But if Pepsi-Cola were sold below, and not Coca Cola, it would be unlawful. If Pepsi-Cola was discontinued and Coca Cola substituted, the sign would become lawful. A cigarette machine in the lobby might alone determine legality. Similarly one business may advertise in the commercial areas of Appellee City if it has a store there but another may not if its store is in a neighboring community. There is no possible basis for such a discrimination.

Even assuming that the ordinances could otherwise be justified upon some police power basis, such a clear discrimination among activities is without any support. Whatever police power basis might exist to support the prohibition would have equal or greater application to the permitted activity. The exception to the regulation therefore runs directly contrary to the alleged reason for the regulation itself.

It of course is well established that the equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police power laws. A statutory discrimination, however, must be based upon differences that are reasonably related to some appropriate purpose. In *Morey v. Doud* (1957), 354 U. S. 457, the Court struck down an Illinois statute on the ground that its classification constituted a deprivation of the equal protection of the law. After referring to the power of the state generally, the Court said:

> "To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' * * * . . . a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found. * * *
>
> "Of course, distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences.' * * *" (pp. 464-466.)

In the instant case the difference between legality and illegality has no relation to the character or appearance or message contained on the sign. It is a difference which may have no public manifestation or consequence at all. It may be known to the County Recorder alone. We submit that this is not a distinction which would in any way justify the discrimination resulting from the state action in this case.

> "It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences. * * *"
>
> *Hartford S.B.I. & Ins. Co. v. Harrison* (1937), 301 U. S. 459, 463.

> "The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. * * *"
>
> *Mayflower Farms v. Ten Eyck* (1936), 297 U. S. 266, 274.

Appellees attempt to justify the difference upon the grounds that the permitted signs inform the public as to the location of the business involved. This, however, is no distinction because such a sign might be more effective for this purpose located on the building next door or across the street (where it would be unlawful). With respect to products and services, the permitted and the prohibited activity are essentially the same. Each is designed to call attention of the public

to the particular product or service and to urge favorable public reaction to it. But calling attention to such availability again might well be better accomplished by the same sign on the building next door. "'Such a classification is not based on anything having relation to the purpose for which it is made.'" * * * *Smith v. Cahoon* (1931), 283 U. S. 553, 567; *Louisville Gas & E. Co. v. Coleman* (1928), 277 U. S. 32, 37-39; *Cotting v. Godard* (1901), 183 U. S. 79, 115.

We therefore submit that the state action in this case is unreasonable, arbitrary and in violation of the Fourteenth Amendment, there being no reasonable relationship between the permissible and the prohibited effect of the state action and any legitimate aspect of the police power.

For the foregoing reasons we urge that there is vital basis and cause for this Court to hear the appeal in this matter.

Respectfully submitted,

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December 6, 1963.

APPENDIX A.

Opinion of the District Court of Appeal.

[Civ. No. 26575. Second Dist., Div. Two. May 16, 1963.]

Metromedia, Inc., et al., Plaintiffs and Respondents, v. City of Pasadena et al., Defendants and Appellants.

Appeal from a judgment of the Superior Court of Los Angeles County. Steven S. Weisman, Judge. Reversed.

Action to determine constitutionality of city ordinances regulating billboards and to enjoin their enforcement. Judgment for plaintiffs reversed.

Wendell R. Thompson, City Attorney, Donald B. Hagler, and Evelynn M. Finn, Deputy City Attorneys, for Defendants and Appellants.

Gibson, Dunn & Crutcher, William French Smith, Iverson & Hogoboom and William P. Hogoboom for Plaintiffs and Respondents.

Herndon, J.—This appeal by the City of Pasadena and other named defendants, hereinafter generally referred to as "appellants," is taken from a judgment which declares that certain ordinances of appellant city regulating billboards are unconstitutional and enjoin their enforcement.

Ordinance No. 4487, hereinafter referred to as the "billboard ordinance," provides, in part, that effective May 17, 1959, "No roof sign shall be erected, constructed, relocated or maintained upon any building excepting those which (1) bear the name of the building whereon the sign is located; (2) bear the name of the person, firm or corporation occupying the building or

portion thereof and the type of business conducted by said person, firm or corporation. All said signs must be an integral part of the building. No more than one roof sign shall be permitted for each exterior facing of a building." This ordinance defined "roof sign" as "a sign erected upon or above a roof or parapet of a building." Existing signs were exempted from this ordinance except insofar as their removal might be required by the zoning ordinance applicable to such signs or uses.

Ordinance No. 4495, effective July 19, 1959, hereinafter referred to as the "zoning ordinance," amended "The Zoning Plan and Code of the City of Pasadena" by providing in part that all roof signs, except those relating to the ownership or business conducted on the premises, would have to be removed prior to July 1, 1961.

On July 15, 1954, appellant city had amended its then effective zoning ordinance so as to prohibit the *future* construction of outdoor advertising structures in Zone C-2 (retail-commercial), but permitted the continued maintenance of such signs then extant. The above mentioned zoning ordinance of July 19, 1959, also provided that existing "ground signs" which did not meet the requirements of the 1954 amendment, would have to be removed by July 1, 1961. However, the continued construction and use of "ground signs" still remained permissible in all other commercial and industrial zones.

Respondents herein are two firms "engaged in the outdoor advertising business, including the erection and maintenance of outdoor advertising structures on leased property, and the sale of advertising space on such out-

door advertising structures. . . ." Prior to the enactment of the ordinances in question, respondent Metromedia, Inc., had erected 13 roof signs in the City of Pasadena and respondent Pacific Outdoor Advertising Company, hereinafter referred to as "Pacific," had erected 20 such signs.

The sole question presented by this appeal is whether or not the trial court erred in its judgment, holding in effect, that the distinction made in these ordinances between "point-of-sale" and "non-point-of-sale" signs rendered them unconstitutional as being "unreasonable, arbitrary, confiscatory and discriminatory in *classification*. . . ." (Italics added.) Although respondents have urged many other considerations in the brief filed by them in this court, it is apparent from the judgment, the findings of fact, and the stipulations entered into by the parties during the trial, that no other basis for a holding of unconstitutionality either was urged by respondents during the trial or was passed upon by the trial court.[1]

These stipulations by respondents indicating the limits of the issues being presented were virtually mandatory in any event, because their expert on zoning plans and ordinances had testified earlier that he considered it established beyond question that sound planning and zoning practice required the total elimination of billboards in certain districts and their regulation in all districts. However, he expressed his opinion that "non-point-of-sale" signs still should be considered proper in industrial areas and, further, that there was, in his opinion, "no objective basis for discriminating

[1]See footnote 1 appended at end of opinion.

in regulation between standard poster panels and point-of-sale signs."

We, therefore, are not called upon to consider whether or not certain early decisions in this state (which were written prior to the need for, or the adoption of, comprehensive zoning plans) would require us to destroy the patterns sought to be created by local legislative bodies acting upon reports and studies laboriously compiled by their planning commissions. Today, economic and æsthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future. Respondents, having spared the trial court the task of attempting to distinguish and weigh these threads, may not now urge such considerations upon this court in support of a judgment rendered after a trial which was limited to more restricted issues.

Further, although the trial court found that the ordinances in question created an unconstitutional "classification," it expressly struck from the proposed judgment as submitted by respondents, a determination that said ordinances also operated as an unconstitutional "prohibition" of respondents' businesses. This was entirely proper, because said ordinances do not even purport to "prohibit" outdoor advertising by means of non-point-of-sale billboards in those industrial and commercial zones in which respondents claim any right to operate, but merely regulated their use of rooftops and required the elimination of the nonconforming use formerly permitted in C-2 zones.

Therefore we are not called upon to decide whether or not respondents' billboards might be eliminated en-

tirely from the City of Pasadena by appropriate legislation directed to that purpose. The only evidence submitted by respondents in support of this secondary issue was offered for the purpose of showing that as the city expands it becomes increasingly difficult for them to find ground sites that are visible to a sufficiently large surrounding area, and that, as the values of such properties increase, it becomes more difficult for them to compete economically in obtaining such sites from other potential commercial users. This problem, however, would face respondents regardless of the regulations placed upon roof signs. Certainly the inexorable pressures of supply and demand cannot reasonably be urged as grounds for declaring unconstitutional otherwise valid regulations.

Finally, by reason of the stipulations which are set forth in footnote 1, appended hereto, no issue was tendered to the court below with respect to the reasonableness of the period allowed respondents for the removal of their nonconforming signs; hence, this potential basis for arguing the unconstitutionality of the ordinances is not before us. (*Cf. City of Santa Barbara v. Modern Neon Sign Co.*, 189 Cal.App.2d 188, 195-196 [11 Cal.Rptr. 57].)

As indicated, then, we are faced with this single question: Is an ordinance which, for regulatory purposes, separately classifies point-of-sale and non-point-of-sale "unreasonable, arbitrary, confiscatory and discriminatory" in such classification? We believe that common sense, logic, precedent and the public interest combine to dictate a definite and positive answer in the negative.

At the time this case was tried, no appellate court in California had decided the precise issues then presented, and respondents, in their points and authorities filed below, relied upon a memorandum opinion of the Superior Court of Monterey County filed June 26, 1961. On December 27, 1962, Division Three of the First District Court of Appeal, reversed the trial court on this point in *National Advertising Co. v. County of Monterey*,* 211 A. C. A. 463, 467-468 [27 Cal. Rptr. 136], stating:

"It is true that signs 'relating only to goods sold or services rendered upon the building site on which . . . erected or maintained,' as permitted by the ordinance, may, athough strictly limited as to size and number, have much the same appearance as off-site signs. A significant difference, however, is that the on-site sign is but a part of, and wholly incidental to, the business conducted upon the site and which the ordinance has properly determined to be permissible in that district. Off-site signs, on the contrary, constitute a wholly distinct business, that of outdoor advertising (see opinion of Brennan, J., in *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 14 [93 A.2d 362]). The ordinance before us merely limits the business of outdoor advertising, as it limits other businesses, to specified districts. An early (1909) case cited by plaintiffs (*Varney & Green v. Williams, supra*, 155 Cal. 318 [100 P. 867, 132 Am.St.Rep. 88, 21 L.R.A. N.S. 744]) is not in point because it did not involve a comprehensive zoning ordinance.

*Advance Report Citation: 211 A.C.A. 463, 467-468

"From other jurisdictions, plaintiffs cite only a trial court opinion (*Central Outdoor Advertising Co. v. Village of Evandale* (Ohio Ct. Com. Pleas) 124 N.E.2d 189). The great weight of authority supports the propriety of the classification (*United Advertising Corp. v. Borough of Raritan, supra; Kelbro, Inc. v. Myrick*, 113 Vt. 64 [30 A.2d 527]; *Rockingham Hotel Co. v. North Hampton*, 101 N.H. 441 [146 A.2d 253]; *Criterion Service, Inc. v. City of East Cleveland* (Ohio App.) 55 Ohio L.Abs. 90 [88 N.E.2d 300]; *Landau Advertising Co. v. Zoning Board of Adjustment*, 387 Pa. 552 [128 A.2d 559]; *Murphy, Inc. v. Town of Westport*, 131 Conn. 292 [40 A.2d 177, 156 A.L.R. 568]).' We accept the reasoning of those decisions, and sustain the classification."

The following discussion found in the cited case of *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 14 [93 A.2d 362, 365-366], appears most apposite here:

"The business sign is in actuality a part of the business itself, just as the structure housing the business is a part of it, and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard as in the case of this ordinance. Plaintiff's placements of its advertising signs, on the other hand, are made pursuant to the conduct of the business of outdoor advertising itself, and in effect what the ordinance provides is that this business shall not to that extent be allowed in the borough. It has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards and similar outdoor structures located by per-

sons in the business of outdoor advertising, justify the separate classification of such structures for the purposes of governmental regulation and restriction. [Citations.]

"And as such separate classification offends no constitutional provision, there also exists no invidious discrimination in the provisions of the ordinance barring plaintiff's signs in the business and industrial zones while allowing therein manufacturing plants, junk yards, coal and coke yards and other uses suggested by plaintiff, as also having undesirable attributes. It is enough that outdoor advertising has characteristic features which have long been deemed sufficient to sustain regulations or prohibitions peculiarly applicable to it."

It is to be noted that, unlike the ordinance discussed in the *Raritan* decision, the ordinances here involved do not even purport to prohibit respondents from conducting their businesses in all zones, or, in fact, in any zone where such businesses have been authorized since 1954. It merely regulates their activities to the extent that roof top signs no longer will be permitted. The reasonableness of this regulation is strengthened by the other provisions in the ordinance which require that even those point-of-sale roof top signs that still may be used in the affected zones henceforth "must be an integral part of the building." The enforcement of this requirement will result in the removal of all those point-of-sale signs which respondents assert are "identical" to their own, for it does not appear that any of respondents' signs is "an integral part of the building" upon which it is placed.

In addition, most of respondents' arguments relating to their "use" of the land upon which their signs are

located are mere exercises in sophistry, for in no real sense are the signs "used" upon the *land* on which they are located. As the president of respondent Pacific Co. testified: "Q. Would you describe the manner in which you as a business or industry locate these locations for your business? A. Well, we have certain standards in our business that we must adhere to, and those standards are largely based on circulation and visibility. Q. Would you explain what you mean by circulation? A. Well, in order to warrant the cost of our medium, there must be certain minimum standards of traffic, number one; and, number two, in the field of visibility, obviously what you are going to sell must have a reasonable opportunity to be seen."

Clearly, then, the signs are "used" in a realistic sense only where the light reflected therefrom strikes the eyes of the users of the public streets or adjoining private property. In the case of roof signs, their true "use" may occur at considerable distances, even on property located in other zones, and may not even be visible, i.e., "capable of being used," by persons located upon the same property as the sign. Moreover, unlike point-of-sale signs, the members of the public required to "use" respondents' signs gain no benefit therefrom in the sense that they are thereby directed to the location of a business activity which they may be immediately desirous of patronizing.

On the contrary, respondents' signs merely extol the alleged merits of various products in the abstract and are neither directional guides nor identifying markers relating to the business or use actually being conducted on the property upon which they are located. The distinction between the two classes of signs, therefore, is

not unreasonable, arbitrary or discriminatory in any constitutionally prohibited sense.

Judgment in the instant case was rendered prior to our Supreme Court's decision in *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal.2d 515 [30 Cal.Rptr. 638, 370 P.2d 342], upholding an ordinance that effectively prohibited the owner of property, suitable only for use as a source of rock, sand and gravel, from exploiting the same, notwithstanding the finding of the trial court that such operations could be conducted thereon "with compatibility to adjacent properties." The court stated at pages 522-523:

"So in *Ambler, supra*, The United States Supreme Court said (272 U.S. at p. 388 [47 S.Ct. 114, 71 L.Ed. 303, 311, 54 A.L.R. 1016, 1025]) 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.' This test of the validity of comprehensive zoning regulations has consistently been applied and followed by this court, so that whenever we have found that reasonable minds might differ as to the necessity or propriety of particular regulations or classifications, we have bowed to the legislative determination and sustained the regulation. [Citations]."

In the instant case, viewing the evidence in the light most favorable to respondents, as we are required to do, the best that can be said is that it proved that reasonable minds *could differ* rather than that reasonable minds *could not differ*. Thus, respondents' witnesses offered their opinions that the admitted "sign clutter" was more the fault of point-of-sale signs than of respondents' signs, and therefore that the present or

dinance was not best suited to solve the recognized problem. Further, when respondents' expert on planning was discussing the possible grounds for the classification made, he stated:

"I then looked at another possible basis for distinguishing between point-of-sale signs and standard poster panel signs, and I asked myself, is it possible that a distinction can be made on the basis that if point-of-sale signs are permitted and standard outdoor signs are prohibited, the number of signs will be reduced, and I honestly think, it is my real opinion, that this is the real reason for making a distinction between point-of-sale signs and standard outdoor signs. It is an unspoken reason. I *am not sure* that it is a valid reason because I *very much doubt* that that will reduce the total number of roof signs. But even if it were to reduce it to a total number of roof signs, I would say that was not a reasonable and objective basis for regulating the number of roof signs. They should be directly related with provisions that apply equally to all types of roof signs." (Italics added.)

Upon cross-examination this same witness testified: "Q. You recognize the fact in general that signs are an evil in Pasadena? A. Yes, I think the sign situation is bad and I think that it is in general, and I think that the so-called point-of-sale signs are the ones that are the offenders. . . . Q. And I am also sure, from your experience as a planner, you realize that it is impossible practically to cure all these evils at one time; isn't that true? A. Yes, but I would say that . . . the proper method of attacking the problem is not to say, 'We will cure the evil all at one time,' but that we will begin to correct the evil uniformly,

and I would think we would devote our major efforts to the areas in which the greatest problems existed first. . . . Q. Now, I believe you testified that there was no difference, in your opinion, or words to that effect, between point-of-sale signs and outdoor advertising structures in Pasadena? A. That's correct, sir. *No, I did not mean to say there was no difference. There obviously are some differences.* What I meant to say, and I hope I said it, was that I was able to find no objective basis for discriminating in regulation between standard poster panels and point-of-sale signs." (Italics added.)

Evidence was received upon which the trial court made findings, *inter alia*, that respondents' signs provided a useful service to the community and were of economic value to it; that some local businesses used the signs and other businesses dealt in the products advertised thereon; that the Pasadena Chamber of Commerce utilized outdoor advertising signs located outside the city to induce people to shop therein; that outdoor advertising signs were substantially less expensive to advertisers than other forms of advertising; that respondents' signs had won art awards for the quality of the material portrayed thereon; that "leading authorities" recognize outdoor advertising as an accepted use of land and buildings in certain areas; and that there is "no *measurable* causal connection between outdoor advertising signs, and traffic accidents." (Italics added.)

Accepting these findings as true, it may be assumed, as stated by respondents' expert, that appellant city was unwise in attacking the evil admittedly existing within its jurisdiction, in the fashion determined upon; how-

ever, as was stressed in the *Consolidated Rock* case *supra*, 57 Cal.2d 515, 523, this assumption furnishes no ground upon which a court properly may substitute its judgment for the lawfully constituted authority, and on constitutional grounds, deprive the authorized legislative body of its right to experiment, a right that necessarily includes the right to err.

Relative to the question of uniformity of method in attacking an admitted evil, it long has been recognized, even in the application of penal legislation, that: "A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." (Mr. Justice Holmes in *Patsone v. Pennsylvania*, 232 U.S. 138, 144 [34 S.Ct. 281, 58 L.Ed. 539, 543].)*

If uniformity or symmetry is not demanded in the application of criminal sanctions or in the total prohibition of otherwise legal and socially useful activities in specified areas of a municipality, then certainly it is not required here where respondents' activities are not being prohibited, but only regulated in a manner found reasonably essential to protect the public interest.

The judgment is reversed.

Fox, P.J., Ashburn, J., concurred.

*The following proceedings appear in the trial record. The court, addressing counsel for appellants with regard to the scope of admissible evidence, stated:

"I will agree with you, and I think counsel would almost stipulate that what you have said is true, because in my book it is

true; but this case, I know that you have the legislative right to enact ordinances about signs, we all agree on that, there is no question." The discussion then proceeds: "Mr. Metheny [Counsel for appellant city]: Apparently not. Mr. Hogoboom: [Counsel for respondent Pacific Co.]: Oh, no, we agree to that. Mr. Smith [Counsel for respondent Metromedia]: With respect to regulation of signs? Oh, yes. Mr. Hogoboom: Certainly we have been regulated for years. Mr. Smith: In my opening statement I conceded that. Mr. Hogoboom: We conceded that.

"The Court: To get back, the turning point of this case is the fact that you are *regulating* non-point-of-sale signs and you are *allowing* point-of-sale signs. That is what I think is the main issue and probably the only issue so far in this case. . . . You have the police power to regulate signs, we all agree, don't we? Mr. Hogoboom: Yes. Mr. Smith: Yes. The Court: The only issue here, I think, is this unconstitutional discrimination. Mr. Metheny: I would like to agree with you if that were the only issue, I would be much more relaxed than I am now. The Court: That is all I see. What other issue do you think there is in this case? Mr. Metheny: I think this question whether or not we have the police power if you find that there is—

"The Court: Opposing counsel have already said that you have the power to regulate signs. Mr. Hogoboom: Our whole testimony has gone to prove the point that you have just made and that is that it is an illegal discrimination, there is no valid basis for it, and we have simply set up all of the possible bases for distinction and knocked them down. That is all we are doing. Mr. Metheny: Will counsel stipulate that is the only issue? Mr. Smith: Could I say this? Mr. Metheny: If they want to narrow it down, I will, but the minute we get out of this court into the District Court of Appeal they might well argue, I will put it that way, we have legislated purely on aesthetics because there is nothing else to support this, and then they will cite the *Varney and Williams* versus *Green* and say, 'Here is a tremendous holding that says you cannot do it just for this reason,' which brings up another issue. Mr. Smith: We would like to note, in any case, we think the present testimony is entirely irrelevant. For one thing it goes to issues, I think, which are not in dispute, namely, I guess the City of Pasadena is growing, and secondly that in any case, assuming the purpose for this, we still say, quite aside from the point-of-sale versus other signs discrimination, that the city, on the grounds that it is growing, cannot single out one legitimate business and say 'You have to go,' and not treat other businesses involved in the same situations on the same basis. . . .

"The Court: Let me try to summarize and see if we can get an agreement, and you correct me if I am wrong. No one here, neither side, contends that the City of Pasadena does not have the right to regulate signs under their police power. Mr. Hogoboom: I will go further. I will stipulate they have a right to

regulate within their comprehensive zoning plan any commercial establishment within the City, where they can be located, in what zones they can be located, the conduct of the business in various licensing statutes. They can even regulate hours of business of some because for valid reasons there are distinctions, but they simply cannot, we contend, single out— The Court: Let's stop right there. Do you agree with that, Mr. Smith? Mr. Smith: Yes. Mr. Metheny: We will accept that stipulation.

"The Court: That is out of the way. Now, the only issue that I see right now is that the plaintiffs feel that while the City has the right to regulate signs; that in this particular ordinance or ordinances they acted in a discriminatory manner, discriminating against certain businesses and excluding other businesses. And in effect, I am saying the same thing, they had no right to prohibit non-point-of-sale signs and allow the three types of signs that are in the ordinances. Mr. Metheny: You are stating that as the only issue? The Court: Isn't that it? Mr. Metheny: I will stipulate that is the only issue, only other issue. Mr. Smith: The judge referred to two issues. The Court: Two are actually one as far as I am concerned. Do you think there are two? Mr. Smith: Yes, I do.

"The Court: You state them then. Mr. Smith: I do. I think one issue goes to the question as to whether or not the City can legislate a business such as ours out of existence, prohibit it, in commercial and industrial areas where other businesses are permitted. That is one issue. As I say, that is the basic issue. Then, the second issue goes to the question as to whether or not they can discriminate as we say they have here between so-called point-of-sale signs and our types of signs, you see. The Court: Then you are contending that it would even be an invalid act if the city were to say no advertising roof signs at all? Mr. Smith: In commercial and industrial areas, yes. . . . The Court: But at least we have narrowed down the situation to two issues, one of which, I think, is very important, the one I said before. Mr. Metheny: Yes, I concur."

APPENDIX B.

Findings of Fact and Conclusions of Law.

In the Superior Court of the State of California in and for the County of Los Angeles.

Metropolitan Broadcasting Corporation, et al., Plaintiffs, v. City of Pasadena, et al., Defendants. No. 749335.

The above entitled matter came on regularly for trial on and was tried on September 19, 20, 21 and 22, 1961 in Department 27 of the above Court, the Honorable Steven S. Weisman, Judge presiding, the Court sitting without a jury. Iverson and Hogoboom, by William P. Hogoboom, and Gibson, Dunn & Crutcher, by William French Smith, appeared for the Plaintiffs, and Wendell R. Thompson, City Attorney, and Fred R. Metheny, Deputy City Attorney, appeared for the Defendants.

On October 5, 1961 the Court and counsel for the parties viewed the relevant zones of Defendant City of Pasadena.

On the basis of the Stipulation of Facts, the evidence, both oral and documentary including a view of the relevant zones within Defendant City of Pasadena, the Briefs and Points and Authorities on file herein by Plaintiffs and Defendants, and the oral argument of counsel, and being fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law constituting the decision of the Court in this matter:

FINDINGS OF FACT

1. Plaintiff Metromedia, Inc. (referred to in the Complaint and other papers herein as Metropolitan Broadcasting Corporation) at all times herein mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware; said corporation at the aforesaid times was and now is duly authorized to do business in California, and was and now is engaged in the advertising sign business therein through its division, Foster and Kleiser; Plaintiff Metropolitan Broadcasting Corporation will hereinafter be referred to as Foster and Kleiser. Plaintiff Pacific Outdoor Advertising Company at all times herein mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California and will hereinafter be referred to as Pacific Outdoor.

2. Defendant City of Pasadena, at all times herein mentioned was, and now is, a municipal corporation organized and existing under and by virtue of the laws of the State of California. Defendant Don C. McMillan at all times herein mentioned was, and now is, the duly appointed, qualified and acting City Manager of the City of Pasadena and is sued in that capacity. Defendant Robert McCue at all times herein mentioned was, and now is, the duly appointed, qualified and acting Superintendent of Building of Defendant City and is sued in that capacity. Defendant Byron B. Gentry at all times herein mentioned was, and now is, the duly appointed, qualified and acting City Prosecutor of Defendant City and is sued in that capacity. Defendant Paul Shaffer at all times herein mentioned was, and now is, the duly appointed, qualified and act-

ing Planning Director of Defendant City and is sued in that capacity. Defendants Don C. McMillan, Robert McCue, Byron B. Gentry, and Paul Shaffer, and each of them, are charged with the duty of enforcing the provisions of the laws and ordinances, and in particular the provisions of Ordinance Numbers 4487 and 4495 of Defendant City. Plaintiffs' Exhibit 2 is a true copy of the Charter of Defendant City.

3. Plaintiffs, and each of them, are now and have been for many years engaged in the outdoor advertising business, including the erection and maintenance of outdoor advertising structures on leased property, and the sale of advertising space on such outdoor advertising structures commonly referred to as advertising signs or bulletins. Many of Plaintiffs' signs have been for many years, and now are, located within the boundaries of Defendant City. Some of Plaintiffs' signs in said City were and are physically located on the roofs of buildings; some are located on the ground, and a few are located on the sides of buildings. All are located in commercial, manufacturing and industrial zones, and at the time of the enactment of the ordinances herein referred to were conforming uses. All were erected pursuant to building permits issued by Defendant City. Plaintiff Foster and Kleiser presently owns and maintains thirteen (13) roof signs on leased property within Defendant City and Plaintiff Pacific Outdoor Advertising Company presently owns and maintains twenty (20) roof signs on leased property in Defendant City.

4. Available locations for ground signs in Defendant City are rapidly diminishing. Because of height limitations imposed by ordinance of Defendant City and because of the decline in the availability of unim-

proved land and suitable ground areas, approximately twenty per cent of the ground locations now used by or available to Plaintiffs are being eliminated each year, without replacement.

5. Plaintiffs, and each of them, for many years have customarily followed a business practice of entering into leases with the owners of the land or buildings on which said signs are erected. All of Plaintiffs' existing roof signs located in Defendant City were erected and are now maintained under lease with the owners of the land or buildings. These leases were in effect at the time of the enactment of the ordinances hereinafter referred to. The majority of the leases are for a minimum period of ten (10) years and the remainder are for a minimum period of five (5) years, subject in each case to cancellation for specified reasons. All of Plaintiffs' leases provide for renewal options or for continuation of the lease on a month to month, year to year, or similar periodic occupancy at the expiration of the fixed term of said leases. The total annual amount of rent paid by Plaintiffs for leases for roof signs or structures in the Defendant City is approximately $5,450.00 for Plaintiff Foster and Kleiser and approximately $6,800.00 for Plaintiff Pacific Outdoor.

6. Plaintiff Foster and Kleiser had expended approximately $25,000.00 for erection and construction of its outdoor advertising roof signs or structures located within Defendant City at the time the ordinances hereinafter referred to were enacted; and Plaintiff Pacific Outdoor had expended approximately $28,000.00 for the erection and construction of its outdoor advertising roof signs or structures located within Defendant City at the time the ordinances hereinafter referred to

were enacted. A number of such signs were constructed in 1958 and a number in 1959. Others were constructed prior thereto. All have been maintained continuously since the date of their construction to the present time. In addition to the physical cost of construction of each sign, the Plaintiffs' business requires them to prorate a proportionate cost of their overhead expenses to each sign location and over the period of each sign lease. The cost of removal of the aforesaid signs or structures would be more than $4,000.00 for Plaintiff Foster and Kleiser and more than $4,250.00 for Plaintiff Pacific Outdoor.

7. Plaintiffs' roof signs or structures within Defendant City constitute an integral part of their advertising space selling business which is conducted primarily through package or broad exposure advertising, utilizing large numbers of each of Plaintiffs' signs, in the entire Southern California area. Any removal of Plaintiffs' roof signs in Defendant City would constitute a disruption of Plaintiffs' business in Defendant City and contiguous areas by disrupting Plaintiffs' broad exposure advertising program which is based on fundamental established and customary advertising methods of the outdoor advertising industry.

8. Plaintiff Foster and Kleiser's gross annual revenue attributable to its roof sign advertising business within the City of Pasadena is approximately $22,000.00 per year. Plaintiff Pacific Outdoor's gross annual receipts attributable to its roof sign advertising business within the City of Pasadena is approximately $35,000.00 per year. The net annual revenue attributable to its roof sign advertising business within the City of Pasadena is approximately $2,000.00 per year

in the case of Foster and Kleiser and $2,500.00 per year in the case of Pacific Outdoor.

9. Plaintiffs' signs are of two types—poster panels and painted bulletins, each a standard size. Each sign and structure of Plaintiffs is regularly maintained by Plaintiffs including frequent inspection, painting and cleaning. The area upon which each of Plaintiffs' structures is located is kept clean. Plaintiffs' Exhibit 7 constitutes a true representation of the roof signs maintained by Plaintiffs in the commercial, manufacturing and industrial areas of Defendant City.

10. The basic zoning plan of Defendant City in effect for many years is set forth in the "Zoning Ordinance of the City of Pasadena, California, Ordinance No. 4322," a copy of which is attached as Exhibit A to the Complaint. Plaintiffs have for many years maintained and now maintain outdoor advertising signs in Zone C-2 (Retail-Commercial Zone), Zone C-3 (Commercial Zone), Zone C-M (Commercial and Manufacturing Zone) and Zone M (Manufacturing and Industrial Zone). On July 15, 1954, the Defendant City amended said Zoning Ordinance prohibiting future construction of outdoor advertising structures in Zone C-2 (Retail-Commercial Zone). This amendment did not apply to existing outdoor advertising structures in such zones and Plaintiffs have continued to maintain signs in all of the zones hereinbefore listed while not constructing any additional signs in said Zone C-2 (Retail-Commercial Zone). Plaintiffs' roof signs, as well as all other signs maintained by Plaintiffs, have at all times pertinent to this action been and now are located only in the above areas zoned by Defendant City for commercial, manufacturing and industrial

purposes. Plaintiffs' Exhibit 3 is a true representation of a map of Defendant City and the various zoned areas as designated therein.

11. In addition to the comprehensive zoning plan, Defendant City has had in effect for many years a comprehensive ordinance (commonly known as the Sign Ordinance) regulating the size and type of sign, method of construction, wind load and other matters related to the physical construction and appearance of said signs. Said regulations were set forth in Ordinance No. 2692 of Defendant City. All of Plaintiffs' roof signs at all times herein mentioned were and are constructed and maintained in conformance with all such regulations of Defendant City.

12. The Board of Directors of Defendant City, at a meeting thereof held on April 7, 1959, purportedly adopted Ordinance No. 4487, entitled "An Ordinance Of The City of Pasadena Defining, Regulating and Licensing the Erection, Construction and Maintenance of Advertising Structures and Repealing Ordinance No. 2692," which said Ordinance was signed and approved on April 7, 1959, was published on April 17, 1959, and purported to take effect on or about May 17, 1959. A true and correct copy of the aforesaid Ordinance No. 4487 is attached to the Complaint as Exhibit B. By its terms said Ordinance No. 4487 prohibits the future erection, construction, relocation, maintenance, alteration or reconstruction of roof signs by plaintiffs in the course of their advertising business in Defendant City.

13. Section 16 of the aforesaid Ordinance No. 4487 provides in part as follows: "SECTION 16. ROOF SIGNS. No roof sign shall be erected, constructed, re-

located or maintained upon any building excepting those which (1) bear the name of the building whereon the sign is located; (2) bear the name of the person, firm or corporation occupying the building or portion thereof and the type of business conducted by said person, firm or corporation. All said signs must be an integral part of the building. Not more than one roof sign shall be permitted for each exterior facing of a building." Section 2(S) of said Ordinance defines "roof sign" as "a sign erected upon or above a roof or parapet of a building."

14. Section 27 of the aforesaid Ordinance No. 4487 provides: "SECTION 27. EXEMPT EXISTING SIGNS. The provisions of this ordinance shall not apply to any advertising structure, sign, or any sign device legally constructed and installed prior to the adoption of this ordinance except as provided in Section 11 of this ordinance, and except as may be provided in any amendment to the Zoning Ordinance pertaining to the removal of nonconforming signs or uses, but no such advertising structure or sign device shall be altered or reconstructed unless the same when so altered or reconstructed shall comply with the requirements of this ordinance, except that nothing herein contained shall be construed as preventing a change or alteration of the advertising display matter or material upon any sign or any repair of any sign which does not impair, weaken or harmfully affect the structural strength, stability or wind resistability of any such sign."

15. The Board of Directors of Defendant City in a meeting thereof held on June 16, 1959, purportedly adopted Ordinance No. 4495, entitled "An Ordinance of

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MATTHEW BENDER & COMPANY

4-6-64

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the City of Pasadena Amending Ordinance No. 4322 Known as 'The Zoning Plan and Code of the City of Pasadena'" which said Ordinance was signed and approved on June 16, 1959, was published on June 19, 1959 and purported to take effect on or about July 19, 1959. A true and correct copy of said Ordinance No. 4495 is attached to the Complaint as Exhibit C. By its terms Ordinance No. 4495 requires that all roof signs except those referring to activities conducted in the buildings on which they are located be removed prior to July 1, 1961. The provisions thereof would require plaintiffs to remove all of their roof signs in Defendant City prior to said date. By its terms, Ordinance No. 4495 also requires that all other signs maintained by plaintiffs, such as ground signs, be removed from the C-2 Zone within said City prior to July 1, 1961.

16. Section 5 of the aforesaid Ordinance No. 4495 provides as follows: "SECTION 5. Subsection (A)-(3) of Section 3.09 of said ordinance hereby is amended by deleting therefrom the word 'Billboards' and by adding there to the words 'Outdoor advertising structure (ground signs only)'". Section 5 of the aforesaid Ordinance No. 4495 by referring to "ground signs only" has the effect of prohibiting all but ground signs in Zones C-3, C-M and M.

17. Section 9 of the aforesaid Ordinance No. 4495 provides as follows: "SECTION 9. Section 4.01 of said Ordinance hereby is amended by adding thereto Subsection (G) as follows: '(G) NONCONFORMING BILLBOARDS—Effective July 1, 1961, all outdoor advertising structures which are not in compliance with the regulations of this ordinance shall be removed.'"

18. Plaintiffs' Exhibit 5 constitutes a true representation of the type of outdoor advertising signs which have been permitted in Defendant City under the ordinances referred to above. Various business activities are permitted under Defendant City's Zoning Ordinance No. 4322 as amended, in the zones from which Plaintiffs' roof signs would be excluded by the ordinances referred to above. Plaintiffs' Exhibit 6 constitutes a true representation of businesses which are thus permitted.

19. The business community of Defendant City, acting through the Pasadena Chamber of Commerce, utilizes the outdoor advertising signs of Plaintiff Foster and Kleiser for the purpose of inducing persons to shop in Defendant City. Such signs are located outside of Defendant City on highways leading into the City. Plaintiffs' Exhibit 8 constitutes a true representation of such outdoor advertising signs.

20. A substantial number of local businesses engaged in selling the products and services of such businesses within Defendant City, utilize Plaintiffs' outdoor advertising roof signs in Defendant City. A substantial number of businesses located in Defendant City also sell products and services in Defendant City which are provided on a statewide, regional or national basis and which are advertised on Plaintiffs' outdoor advertising roof signs located in Defendant City. Plaintiffs' Exhibit 4 constitutes a representative list of such advertisers.

21. The cost per thousand of unit impressions of outdoor advertising is $00.47. This compares with the cost per thousand of unit impressions for newspaper advertising of $16.85 and $25.73 for radio ad-

vertising. These figures are based upon an objective study made in accordance with recognized and accepted survey and statistical methods, and constitute an accurate cost comparison as set forth in Plaintiffs' Exhibit 15. Effective advertising is thus available in the form of outdoor advertising signs including roof signs at a substantially less expense than with other forms of advertising.

22. Plaintiffs' outdoor advertising business including outdoor advertising roof signs, provides a useful service and is of economic value to Pasadena businesses, advertisers, the consumers and users of products and services, and the public generally. Such outdoor advertising signs stimulate the purchase and use of goods and services advertised. Such business also performs a public service function by posting displays at its own expense, of a public service nature relating, among other things, to traffic safety and charitable and civic activities. Plaintiffs' Exhibits 9 and 10 are true representations of such public service displays.

23. Members of the outdoor advertising industry, including plaintiffs herein, enter their outdoor advertising displays in national art competitions, including the annual competition conducted by the Art Directors Club of Chicago. Awards are given in such competitions for outstanding artistic and esthetic accomplishment in the field of outdoor advertising and Plaintiffs and each of them have won awards in such competitions. Plaintiffs' Exhibit 11 contains examples of such displays.

24. The business of outdoor advertising is a recognized and accepted use of land and buildings in commercial, manufacturing and industrial zones. It is rec-

ognized as such by leading authorities in the City Planning field, in zoning ordinances generally in the United States, and among others by the Los Angeles County Regional Planning Commission and by the Federal Interstate Highway Act.

25. There is no measurable causal connection between outdoor advertising signs, including roof signs, and traffic accidents. Two surveys into the causes of traffic accidents establish that there is no such connection between outdoor advertising signs, including roof signs, and traffic accidents. These surveys, one conducted by the Michigan State Highway Department and the other by the Driving Research Laboratory of Iowa State College are independent and objective studies conducted in accordance with recognized and acceptable investigating, evaluating and statistical methods. The results of said surveys are contained in Plaintiffs Exhibits 12 and 13. Recognized authorities in the traffic safety field have found no measurable connection between outdoor advertising signs and traffic accidents.

26. Plaintiffs' outdoor advertising signs, including the roof signs of plaintiffs maintained within the City of Pasadena, are not traffic hazards nor will they cause drivers' eyes to be diverted so as to constitute a traffic hazard.

27. Plaintiffs' outdoor advertising signs, including roof signs, do not constitute a threat to public safety within the Defendant City of Pasadena.

28. Plaintiffs' outdoor advertising signs do not constitute a threat to, or adversely affect, the health, safety, general welfare, morals, prosperity, comfort or interest of the public within Defendant City. Such signs do not constitute a nuisance within Defendant City.

29. The outdoor advertising structures maintained by Plaintiffs in the commercial, manufacturing and industrial zones of Defendant City are compatible with the commercial, manufacturing and industrial uses permitted in each of such zones and with the uses presently being made in such zones. Plaintiffs' businesses constitute a useful and legitimate use of property in such zones.

30. Plaintiffs do not engage in the business of constructing or maintaining signs which principally advertise goods or services sold or provided in the location upon which the sign is constructed or maintained, although from time to time in the course of changing its displays one of Plaintiffs' signs may coincidentally advertise products sold or activities conducted in the location where the sign is maintained.

31. The reasonable economic life of the outdoor advertising roof structures maintained by Plaintiffs in Defendant City is between 15 to 20 years.

32. Unless enjoined and restrained from doing so, Defendants and each of them intend and threaten to enforce the aforesaid provisions of such ordinances against Plaintiffs, will require Plaintiffs and each of them to remove existing roof signs and structures, and will prevent and prohibit Plaintiffs from erecting, constructing, relocating or maintaining Plaintiffs' roof signs or structures within Defendant City. Unless Defendants are enjoined and restrained from enforcing such provisions of such ordinances, Plaintiffs cannot be fully compensated for damages and are without any adequate remedy at law.

33. Any Finding of Fact that is contained in the following Conclusions of Law is hereby expressly incorporated in these Findings of Fact as though expressly set forth herein.

CONCLUSIONS OF LAW

1. The Court finds in all respects as set forth in the foregoing Findings of Fact and any Conclusion of Law that is contained in the foregoing Findings of Fact is hereby expressly incorporated in these Conclusions of Law with the same force and effect as though herein expressly set forth.

2. Sections 5 and 9 of Ordinance No. 4495 of Defendant City and Sections 16 and 27 of Ordinance No. 4487 of Defendant City, jointly and severally, are unreasonable, arbitrary, confiscatory and discriminatory in classification ~~and prohibition~~ (SSW), and each separately is and together are unconstitutional, invalid, null, void and of no effect and are in violation of Sections 1, 11, 14, 16 and 21 of the Constitution of the State of California and of the Fourteenth Amendment to the Constitution of the United States.

3. Plaintiffs are entitled to a judgment and decree whereby Defendants and each of them and their officers, agents, representatives, servants, public agencies and boards of Defendant City and any person or persons acting or attempting to act by, through or under the aforesaid sections of said ordinances, or any of them, are permanently enjoined and restrained from enforcing each of the aforesaid sections of said ordinances, from proceeding under them or any of them, from treating the aforesaid sections of said ordinances or any of them as constitutional, valid, subsisting or

enforceable, and from in any way enforcing or attempting to enforce the provisions thereof against Plaintiffs or either of them.

4. Plaintiffs are entitled to their costs and disbursements incurred or expended herein.

Let judgment and decree be entered accordingly.

Dated: November 27, 1961.

/s/ Steven S. Weisman.

Judge of the Superior Court

APPENDIX C.

"Sign Ordinance of the City of Pasadena," Ordinance Number 4487.

"*SECTION 16. ROOF SIGNS.* No roof signs shall be erected, constructed, relocated or maintained upon any building excepting those which (1) bear the name of the building whereon the sign is located; (2) bear the name of the person, firm or corporation occupying the building or portion thereof and the type of business conducted by such person, firm or corporation. All such signs must be an integral part of the building. Not more than one roof sign shall be permitted for each exterior facing of a building.

"A. PROJECTION. No roof sign shall project beyond the face or wall of a building.

"B. HEIGHT OF SIGN ABOVE ROOF. No sign erected upon or above the roof of a building shall exceed a total height in any part thereof of twenty-five feet (25') above such roof as measured vertically from the level of the top of the parapet wall nearest the sign, or from the highest point of the roof directly under the sign.

"EXCEPTION: On buildings more than five (5) stories in height, the height of the sign above the roof may be increased five feet (5') for every story above five (5).

"C. CLEARANCES ON ROOF SIGNS.

"(1) Signs exceeding a height of four feet (4') above the roof and erected at right angles to the face of the building shall have a clear and

unobstructed passageway at least three feet (3′) wide and four feet (4′) high located not more than twenty feet (20′) from the face of the building.

"(2) Roof signs erected parallel to and above the exterior or parapet walls of a building, and which would limit access to the roof in any way, shall be approved by the Chief of the Fire Department.

"D. WIDTH. No roof sign shall exceed a width of fifty feet (50′).

"E. DESIGN AND CONSTRUCTION.

"(1) DESIGN.

"(a) Roof signs below a height of sixty feet (60′) above grade shall be so designed and constructed that they will safely withstand a load from any direction of twenty (20) pounds per square foot of exposed surface. Roof signs above a height of sixty feet (60′) above grade shall be so designed and constructed that they will safely withstand a load from any direction of thirty (30) pounds per square foot of exposed surface.

"(b) Such signs shall be designed with a factor of safety of two against overturning.

"(c) Working stresses shall not exceed those specified in the Building Code for the various materials used.

"(d) No unreinforced parapet wall shall be used for the support or anchorage of any roof sign.

"EXCEPTION: Such wall may be used provided that any additional load created on the exist-

ing parapet construction must be of a compressive nature and limited in amount to such allowables as the Superintendent of Building may deem acceptable on the materials involved.

"(2) CONSTRUCTION.

"(a) The structural components of roof signs shall be of structural steel, and all members three-sixteenths (3/16) of an inch or less in thickness shall be galvanized. Other members shall be protected with a corrosion resistant paint.

"(b) The advertising surface of roof signs may be of metal, of highly compressed fibre-board which weighs not less than sixty (60) pounds per cubic foot and is not less than one-eighth inch (1/8") in thickness, or of other incombustible materials.

"(c) A border of wood not more than eighteen inches (18") in width may be used on such signs.

"(d) Wood not less than two inches (2") in nominal thickness may be used on the working platforms of roof signs.

"(e) Approved plastics may be used on the advertising surface of such signs."

* * *

"*SECTION 27. EXEMPT EXISTING SIGNS.* The provisions of this ordinance shall not apply to any advertising structure, sign, or any sign device legally constructed and installed prior to the adoption of this ordinance, except as provided in Section 11 of this ordinance, and except as may be provided in any amendment to the Zoning Ordinance pertaining to the removal

of non-conforming signs or uses, but no such advertising structure or sign device shall be altered or reconstructed unless the same when so altered or reconstructed shall comply with the requirements of this ordinance, except that nothing herein contained shall be construed as preventing a change or alteration of the advertising display matter or material upon any sign, or any repair of any sign which does not impair, weaken or harmfully affect the structural strength, stability or wind resistability of any such sign."

Ordinance No. 4487, Sign Ordinance of the City of Pasadena.

"Ordinance No. 4495, an Ordinance of the City of Pasadena Amending Ordinance No. 4322 Known as 'The Zoning Plan and Code of the City of Pasadena.'

"SECTION 5. Subsection (A) (3) of Section 3.09 of said ordinance hereby is amended by deleting therefrom the word 'Billboards', and by adding thereto the words 'Outdoor advertising structure (ground signs only)'."

* * *

"SECTION 9. Section 4.01 of said ordinance hereby is amended by adding thereto Subsection (G) as follows:

"'(G) NONCOMFORMING BILLBOARDS.

"'Effective July 1, 1961, all outdoor advertising structures which are not in compliance with the regulations of this ordinance shall be removed.'"

Ordinance No. 4495, An Ordinance of the City of Pasadena Amending Ordinance No. 4322 Known as "The Zoning Plan and Code of the City of Pasadena", Sections 5 and 9.

"Zoning Ordinance of the City of Pasadena, Ordinance No. 4322."

"*Section 3.09 Zone C-3, Commercial Zone*

"Except as in this code specifically provided and allowed:

"(A) USE OF PROPERTY

"No building or land shall be used or occupied for and no building shall be erected, constructed, established, altered, enlarged, maintained, moved into or within a Zone C-3 which is to be used or occupied for any purpose other than as follows:

* * *

"(3) Automobile and trailer sales lot provided that such lot meets all requirements of Section 4.30 of this ordinance.

"Nursery

Outdoor advertising structure (ground signs only)

Public Utilities

Self-service Gas Station"

The same restrictions apply in the Commercial and Manufacturing Zone (Section 3.11) and the Manufacturing and Industrial Zone (Section 3.12), each of which allow uses permitted in the Commercial Zone only insofar as Appellants' activity is concerned.

"*Section 4.01 Nonconforming Uses*

* * *

"(G) *NONCONFORMING BILLBOARDS*

"Effective July 1, 1961, all outdoor advertising structures which are not in compliance with the regulations of this ordinance shall be removed."

Ordinance No. 4322, Zoning Ordinance of the City of Pasadena, Section 3.09 (A)(3) and Section 4.01 (G)

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IN THE

Supreme Court of the United States

October Term, 1963
No. 659

METROMEDIA, INC. (substituted for the name of METROPOLITAN BROADCASTING CORPORATION), a Delaware corporation, and PACIFIC OUTDOOR ADVERTISING COMPANY, a California corporation,

Appellants,

vs.

CITY OF PASADENA, a California municipal corporation, DON C. McMILLAN, as City Manager of said city, ROBERT McCUE, as Superintendent of Building of said city, BYRON B. GENTRY, as City Prosecutor of said city, and PAUL SHAFFER, as Planning Director of said city, and DOES ONE through ONE HUNDRED,

Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

APPELLEES' MOTION TO DISMISS.

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Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

APPELLEES' MOTION TO DISMISS.

Appellees respectfully request and move the dismissal of this appeal.

The sole basis for this motion is that the matter does not present a substantial federal question. Although, certainly, freedom of speech and due process are closely guarded by the Constitution of the United States, these personal guarantees are not here invaded by what is a valid and necessary exercise of the police power.

Ordinances Involved.

Section 3.09(A) (3) of Pasadena's Ordinance No. 4322 authorizes outdoor advertising in Zones C-3, C-M and M by ground signs only (effective June 19, 1959). This does not reduce the zones where such advertising was previously permitted.

Section 4.01(G) of Ordinance No. 4322 (effective June 19, 1959) required the removal of roof signs by July 1, 1961.

Section 3.08(A) (4) authorizes signs which (a) name the building whereon the sign is located, (b) contain the name of an occupier *and* his business, or (c) includes advertising which is strictly incidental and subordinate to a lawful use of the premises.

Section 16 of Ordinance No. 4487 permits roof signs which are made integral parts of buildings when they bear the name of the building whereon the sign is located or bear the name of an occupier *and* his business.

Section 27 of Ordinance No. 4487, in effect, exempts existing signs of the type permitted in Section 16 of that ordinance.

The full text of both the Zoning Ordinance (4322) and the Sign Ordinance (4487) are parts of the record of this appeal, and the pertinent ordinance amendments are set forth in full in Appendix C of Appellants' Jurisdictional Statement.

Questions Presented.

(1) Is freedom of speech abridged by restricting outdoor advertising activities to ground level signs; and, if so, can it be an issue?

(2) Can Pasadena permit the owner and occupier signs authorized by Section 16 of Ordinance No. 4487 and restrict commercial outdoor advertising activities from roof tops?

Statement of the Case.

The City of Pasadena was enjoined in the trial court from requiring the removal of appellants' 33 roof signs in the zones where their ground signs are still authorized. The judgment prohibited the enforcement of the Zoning Ordinance solely because of improper classification since owner and occupier roof signs are still permitted if made an integral part of the building [Clk. Tr. p. 36, lines 5-13].

The California District Court of Appeal, Second Appellate District, reversed the judgment and refused a rehearing. The California Supreme Court denied a hearing. Thus this appeal was necessarily limited to the constitutional question of equal protection or opportunity under the law (Opinion of the District Court of Appeal, Appellants' Jurisdictional Statement, Appendix A, p. 3).

Appellants' roof signs in Pasadena, however, constitute only a minute part of their outdoor advertising empire [Rep. Tr. p. 89, lines 7-12, p. 95, line 5]. The zoning regulation in question, because of its limited scope, can hardly annihilate appellants' overall commercial activities.

Although foreclosed from raising the point in the District Court of Appeal, appellants now contend that they have not had their day in court on the question of an unconstitutional taking of non-conforming use rights. Still there has been no taking of any sign, for they may

be at least partially reused. There has been no loss of use established for any individual signs. The specific monetary loss caused by the removal of each sign has not been clearly fixed. And finally, no real property right is taken since the signs are personal property located on leased roof tops. Appellants' right simply involves the opportunity to have signs seen by the public on public streets.

The appellees' stance in this case is as follows:

First, protection of the people's welfare supports the exercise of the police power now being considered. This power to regulate springs from the need to protect individuals from the clash of competing and incompatible uses. The burden of proof was on the appellants to establish that a profusity of roof signs did not exist or that they were not detrimental to the general welfare. No testimony was adduced to establish that the sign saturation was not inimical. At best, all that was concluded was that a sign problem exists in Pasadena and that reasonable minds could differ as to whose signs are most offensive (Opinion of the District Court of Appeal, Appendix A, Jurisdictional Statement, pp. 10-12).

Next, Pasadena contends that where outdoor advertising can be conducted is a matter for legislative determination. Hence, again the burden is on those attacking the legislation to establish the unreasonableness of the regulation as it applies to each prohibited sign. This has not been done.

Third, it can be agreed that a deep rooted philosophical problem exists in balancing the operating rights of an industry against the human rights of individuals living and working in the community. If the police power cannot be expanded to dignify environment, as well as to preserve property values, then the worth of the individual can only be equated in terms of his value as a means to the profit making ends of commercial enterprises. Consuming may be one important function of man. It is disconsoling to be told, however, that man's ultimate worth is to provide a potential appetite for advertising stimulation.

Fourth, the infrequent projection of political and public service messages cannot camouflage the profit motive. What is really involved here is the location of the message—not the message itself. Therefore, no abridgment of the freedom of speech is involved.

Finally, appellants' business activities are not being prohibited—only regulated. The outdoor advertising industry's cries of wolf have long been heard against municipal regulations. Still the industry continues to flourish. If competitive principles of free enterprise prohibit the appellants from competing for available ground space, the legislative power of the City of Pasadena is not the destroyer. If outdoor advertising is the most effective media for the communication of information, the law of the market place will prevail and outdoor advertising will continue to thrive.

THE FOLLOWING QUESTIONS ARE NOT SUBSTANTIAL.

I.

Reasonable Zoning Regulations Do Not Violate the Free Speech and Press Guarantees of the First and Fourteenth Amendments.

First, do the regulations in question entirely prohibit commercial outdoor advertising in the City of Pasadena? No—outdoor advertising may be conducted within the same zones where previously permitted. This regulation simply required the removal of roof signs over approximately a 2-year period. Ground signs may remain, and additional ground signs may be added. Thus the right to express a point of view by an advertiser continues to exist since no element of censorship is involved and because ground signs are still available.

The right to speak out, however, is not the right being claimed by these appellants. They are space salesmen selling a view—not a point of view. They have never been denied the personal right, as individuals, to express themselves either politically or commercially. The gravamen of their cause of action is business regulation. There is no standing to sue on the issue of the individual's right to free expression.

A case in close proximity to the point is *Valentine v. Chrestensen*, 316 U. S. 52, 62 S. Ct. 301, 86 L. Ed. 486. It involved the distribution of commercial handbills advertising a retired Navy submarine and soliciting visitors for a stated admission fee to which was added a public protest against the New York City Dock Department. Pure advertising could not be freely dis-

tributed. Public protest could be. The opinion stated the following on pages 54 and 55:

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct."

The court went on to hold in effect, that where the primary purpose is commercial, the denial of the use of a public street does not abridge free speech.

A distinction has long been drawn between commercial advertising and protest or opinion literature

(see *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 31 S. Ct. 709, 55 L. Ed. 815; *Packer Corp. v. Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643, 79 A. L. R. 546; *Lewis Pub. Co. v. Morgan*, 229 U. S. 288, 313-316, 33 S. Ct. 867, 57 L. Ed. 1190, 1202, 1203; *Van Doorn v. United States*, 12 Ct. Cust. App. 167; *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 32 S. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916C 296).

The unrestricted distribution of commercial advertisements is not essential to maintaining the freedom of the press (see *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; *Schneider v. Irvington*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155).

Then, obviously the naked intent of these appellants to make a profit through billboard advertising is not concealed under the occasional covers of public service or public protest.

Although outcries for the freedom, dignity and equality of man must be heard, the why, how, where and when of expressions has always been subject to reasonable limitations. Free expression is not an absolute right.

In *Kovacs v. Cooper*, 336 U. S. 77, 85-88, 69 S. Ct. 448, 93 L. Ed. 513, 10 A. L. R. 2d 608, the Court had this to say about it:

> "Of course, even the fundamental rights of the Bill of Rights are not absolute. The Saia Case recognized that in this field by stating 'The hours and place of public discussion can be controlled.'

It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, Schenck v. United States, 249 U. S. 47, 52, 63 L. Ed. 470, 473, 39 S. Ct. 247 that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a threatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.'

* * * * *

"While this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.' The Court never intimated that the visitor could insert a foot in the door and insist on a hearing. *Martin v. Struthers,* 319 U. S. 141, 143, 148, 87 L. Ed. 1313, 1316, 1319, 63 S. Ct. 862, 882. We do not think that the Struthers Case requires us to expand this interdiction of legislation to include ordinances against obtaining an audience for the broadcaster's ideas by way of sound trucks with loud and raucous noises on city streets. The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality."

Thus in the light of the authorities just cited, the salient facts are brought out into sharp focus:

1. Appellants' operation is predominantly commercial, and the public is a captive audience.

2. There is no censor or prohibition of any message.

3. There is no basis to support an abridgment of free speech.

4. Appellants' business can be reasonably regulated in the manner here being considered.

II.

The Ordinances Are Valid in That They Constitute a Proper Exercise of the Police Power Rather Then the Taking of Property.

The District Court of Appeal determined this case on the basis that there was no question involving Pasadena's power to regulate in the manner exercised (Opinion of District Court of Appeal, Appendix A, Appellants' Jurisdictional Statement, p. 4 and footnote pp. 13-15).

Appellants now question the power. The rules for determining whether an exercise of the police power is proper or an unconstitutional taking of property are carefully considered in *Goldblatt v. Town of Hempstead, New York* (1962), 369 U. S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130, which is also cited by appellants in their jurisdictional statement.

The major premise of the *Goldblatt* case is that an exercise of the police power requires first, a public interest which needs protecting; and second, the means

must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive (pp. 594-595).

Considering the first criteria—that a public interest must be involved—the basis for zoning, the need for this technique and the inclusion of billboard advertising within its reach has been firmly established in *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 380; 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016.

Next, whether the regulation is reasonably necessary is a matter for the legislature (*Goldblatt, supra* at p. 595). In the case at bar, even the testimony of appellants' witness established the fact that reasonable minds could differ (opinion of District Court of Appeal, Appellants Jurisdictional Statement, Appendix A, pp. 10-12).

The other rules for determining the constitutionality are also set forth in *Goldblatt, supra* at page 596:

> ". . . Our past cases leave no doubt that appellants had the burden on 'reasonableness.' *E.g.*, Bibb v. Navajo Freight Lines, 359 U. S. 520, 529, 79 S. Ct. 962, 967, 3 L.Ed. 2d 1003 (1959) (exercise of police power is presumed to be constitutionally valid); Salsburg v. Maryland, 346 U. S. 545, 553, 74 S. Ct. 280, 284, 98 L. Ed. 281 (1954) (the presumption of reasonableness is with the State); United States v. Carolene Products Co., 304 U. S. 144, 154, 58 S. Ct. 778, 784, 82 L. Ed. 1234 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it). . . ."

Finally, although the legislation in question merely regulates and does not prohibit, Goldbatt has this to say about prohibition at pages 592 and 593:

> "[1-3] Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. Walls v. Midland Carbon Co., 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920); Hadacheck v. Sebastian, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915); Reinman v. Little Rock, 237 U. S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915); Mugler v. Kansas, 123 U. S. 623, 88 S. Ct. 273, 31 L. Ed. 205 (1887); see Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 S. Ct. 301, 54 L. Ed. 515 (1910). . . ."

Though Goldblatt is cited by the appellants, its reasoning and application can be marshalled against their position. The burden of proof cannot be reversed to require the defendant city to establish the constitutionality of its regulation. The presumption of constitutionality cannot be inverted into a presumption of unconstitutionality. An assumption of sinister intent on the part of the City Board of Directors cannot be adduced from any element of testimony or other evidence in the record.

III.

The Regulations Are Neither Discriminatory nor Arbitrary.

Railway Express Agency v. New York, 336 U. S. 106, 69 S. Ct. 808, 93 L. Ed. 1100, involved a city regulation which prohibited advertising vehicles in city streets but permitted the putting of owner business notices on commercial vehicles so long as such vehicles were engaged in the usual business of the owner. Thus it hits head on the appellants' contention that a sign is a sign. Here the only difference is that the signs are located on roof tops rather than on vehicles.

In clarifying the issues Mr. Justice Douglas stated on page 109 of 336 U. S.:

> ". . . We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. See Olsen v. Nebraska, 313 U. S. 236, 85 L. Ed. 1305, 61 S. Ct. 862, 133 A. L. R. 1500. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

Thus, the taking of property was not even deemed an issue. On the question of equal protection the opinion had this to say on pages 109 and 110:

> "The question of equal protection of the laws is pressed more strenuously on us. It is pointed out

that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

"That, however, is a superficial way of analyzing the problem, even if we assumed that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants."

The *Railway Express Agency* case turned on the question of traffic hazard which is also a valid basis for the legislation in question. The same reasoning

applies, nevertheless, with equal logic to the question of sign blight.

Also appellants interpret Pasadena's regulations different than the City Attorney. In answer to appellants' arguments on page 22 of their jurisdiction statement, an outdoor advertising roof sign would not be legal if it advertised Coca Cola regardless of whether Coca-Cola or Pepsi-Cola were sold in the building for two reasons. First, the sign would have to be an integral part of the building which would make it something different from appellants' roof signs. Second, it must state both the name of the occupier *and* his business (Sec. 16 of Pasadena Ordinance No. 4487) and be strictly incidental and subordinate to a lawful use of the premises. (Sec. 308(A)(4)(c).)

Appellants could erect and maintain an "integral" sign, however, on a building where they took orders or fabricated signs because such a sign would be accessory. It would also be a locater and direction indicator.

As far as differences between the various advertising media are concerned, *Packer Corp. v. Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643 is in point. There the regulation prohibited the sign advertisement of tobacco products but specifically authorized such advertisement by other advertising methods. In considering the classification question the court stated on pp. 110 and 111:

> "Moreover, as the State court has shown, there is a difference which justifies the classification be-

tween display advertising and that in periodicals or newspapers: 'Billboards, street car signs, and placards and such are in a class by themselves. They are wholly intrastate, and the restrictions apply without discrimination to all in the same class. Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have those of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines.' ..... Utah, ..., 297 Pac. 1013, 1019. The legislature may recognize degrees of evil and adapt its legislation accordingly. *Miller v. Wilson,* 236 U. S. 373, 384, 59 L. Ed. 628, 632, L. R. A. 1915F., 829, 35 S. Ct. 342; *Truax v. Raich,* 239 U. S. 33, 43, 60 L. Ed. 131, 136, L. R. A. 1916D, 575, 36 S. Ct. 7., Ann. Cas. 1917B, 283."

Thus, the distinctions between outdoor advertising and other commercial and advertising activities are easily recognizable. The prominent locations of billboards,

their clustering in key locations, the more vivid and ever changing messages, the absence of the locator and accessory use function—all of these factors fit billboards into a class by themselves.

Conclusion.

Appellants attack the validity of the zoning regulation in question behind the shields of free speech, due process and equal protection. The regulation, however, strikes no blow against the commercial activity of outdoor advertising as such. It is still a permitted use in the identical zones where previously allowed. Pasadena has stilled no utterance and threaten none because censorship is no aspect of the regulation. There has been no taking of property since the sign frames may be relocated and reused. In the final analysis this case turns on the loss of an opportunity to have an existing sign at a particular location viewed by captive spectators on the public streets and sidewalks. Is this the taking of a property right for which just compensation must be paid? Is any period of amortization necessary when no use of realty is being lost so far as these appellants are concerned? The answers are obviously no.

On the other side of the scales is the obligation of the City of Pasadena to foster traffic safety, to preserve the balance of land uses for the protection of its people, for the preservation of property values, and perhaps, most important to maintain a dignity of sur-

roundings in a time when the dignity of a people may be a most important asset in their struggle for survival.

Predicated on the foregoing reasons, no need exists to review the final action of the courts of California deciding what is purely a local matter.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963
No. 659

METROMEDIA, INC. (substituted for the name of METROPOLITAN BROADCASTING CORPORATION), a Delaware corporation, and PACIFIC OUTDOOR ADVERTISING COMPANY, a California corporation,

Appellants,

vs.

CITY OF PASADENA, a California municipal corporation, DON C. McMILLAN, as City Manager of said city, ROBERT McCUE, as Superintendent of Building of said city, BYRON B. GENTRY, as City Prosecutor of said city, and PAUL SHAFFER, as Planning Director of said city,

Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

APPELLANTS' REPLY BRIEF.

I.

Appellees purport to justify the ordinances by contending that they do not prohibit Appellants' outdoor medium of public communication but merely confine it to surface locations. The undisputed fact is, however, and the Trial Court found, that the effect of the ordinances is to totally prohibit the entire outdoor medium anywhere in Appellee City including the substantial commercial, manufacturing and industrial areas. The

prohibition is absolute even though this medium was found to be a compatible and proper use in these areas. This result was accomplished by coupling height limitations upon surface signs with the prohibition of roof signs. The known unavailability of locations together with attrition complete the prohibition within a five-year period. [Findings of Fact Nos. 4, 24, 29; Clk. Tr. pp. 25, 32, 34].

The ordinances constitute a method of total prohibition irrespective of the propriety of the use. As this Court stated in *Saia v. New York* (1948), 334 U.S. 558, referring to the ordinances in that case and in *Lovell v. Griffin* (1938), 303 U.S. 444, the ordinances were "dressed in the garb of the control of a 'nuisance' " [334 U.S. 560]. The disguise was unsuccessful and the ordinances struck down.

But in any case Appellants' position is not dependent upon whether the regulation constitutes total prohibition. A substantial interference with the means of disseminating ideas, opinions and information is enough. *Grosjean v. American Press Co.* (1936), 297 U.S. 233. While Appellants do not usually themselves express their views through their roof signs, they furnish the means through which others are enabled to do so. The validity of the extinguishment or regulation of those means certainly raises a substantial federal question for the Court.

While prohibiting Appellants' outdoor medium, the ordinances permit signs which advertise services or products available in the building below. A sign over a drug store may advertise a pill or patent medicine sold below but it would be illegal for a proponent of a ballot

measure or for a candidate to use this sign to communicate his message to the public.

Valentine v. Chrestensen (1942), 316 U.S. 52, is not controlling here. That case was decided upon the basis of a specific intent and purpose to evade the effect of an ordinance by means of a false use of a protected medium of reaching the public. Here it is the medium itself that is destroyed. Certainly no one would contend that the purchase of space on Appellants' signs to convey a political or any other kind of message to the public, would be for the purpose of evading the ordinances of Appellee City.

It is undeniable that the ordinances prohibit throughout Appellee City, and irrespective of proper zoning use, an entire medium of public expression and communication. Because it is relatively inexpensive, it is available to far more persons than other comparable means of communication. It is available to any person or organization desiring to communicate ideas to the public. The prohibition of such a medium clearly raises substantial questions concerning the guarantees of freedom of speech and press. We urge that the validity of ordinances which have this effect should be considered by this Court.

II.

In Appellees' Motion to Dismiss, Appellees merely attempt to demonstrate that the Appellees have met the criteria set forth in *Goldblatt v. Town of Hempstead* (1962), 369 U.S. 590, for determining whether the purported exercise of the police power is proper. First, Appellants submit that this very issue is a substantial federal question and that Appellees have tacitly admitted it to be so in their brief.

Next, applying the *Goldblatt* criteria, Appellees have neither shown that there is a public interest involved which needs protection, *i.e.* a legitimate aspect of the police power upon which the challenged legislation is based, nor have they shown that the challenged ordinances are reasonably necessary for the accomplishment of such purpose.

Throughout the history of this case, Appellees have never made clear just which public interest or aspect of the police power they rely upon. In *Goldblatt, supra*, at page 595, this Court stated that "the ordinance in question was passed as a safety measure, and the Town is attempting to uphold it on that basis." In Appellees' Motion to Dismiss, they state such basis to be "the basis for zoning", and they rely on *Village of Euclid v. Ambler Realty Company* (1926), 272 U. S. 365. In that case, the Court upheld the complete exclusion of businesses and trades of every sort from residential zones on the ground that such exclusion bore "a rational relationship to the health and safety of the community." [272 U.S. 391].

It is evident that this case presents the situation contemplated by the Court in *Village of Euclid v. Ambler, supra*, when it observed ". . . when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable." [272 U.S. 395].

Other bases mentioned by Appellees are "traffic hazards", "sign blight" (pages 14-15), "preservation

of balance of land used for the protection of its people", "preservation of property values", and maintenance of "dignity of surroundings" (pages 16-17).

In the present case the ordinances were not based upon or related to traffic safety. The Trial Court specifically found no connection whatever between the ordinances and any traffic safety purpose. [Findings of Fact Nos. 25-28, Clk Tr. p. 33]. This would appear obvious since the identical sign is lawful or unlawful, depending upon whether it is on one building or next door or on whether its message advertises a particular product or some other. Any traffic safety consideration by definition would apply to both.

It is presumed that by using the terms "sign blight, dignity of surroundings" and "preservation of property values", Appellees have in mind what can be generally called aesthetics. Though aesthetics has been recognized by this Court as a proper basis for the exercise of the power of eminent domain, *Berman v. Parker* (1954), 348 U.S. 26, it has never held that aesthetics was such a public interest as to justify in itself the exercise of the police power to eliminate a business without any compensation. Moreover, assuming for the sake of argument that aesthetics is such an essential public interest, Appellants have demonstrated that the means used here are not reasonably necessary for the accomplishment of such purpose and are unduly oppressive and arbitrary. The testimony adduced at the Trial Court makes it clear that if any aesthetic problem exists it lies with the permitted signs and not the prohibited. [Findings of Fact No. 23, Clk. Tr. p. 32, Rep. Tr. p. 314]. Appellees' argument based upon aesthetics, loses much of its weight when applied to the zones to which the chal-

lenged ordinances are made applicable, namely the commercial, industrial and manufacturing zones.

Preservation of balance of land uses is a nebulous concept, one which is difficult of application in the present situation. The only land, the use of which is attempted to be preserved, are roof tops, on which certain signs other than those belonging to Appellants are allowed to be placed. It can hardly be conceived how the elimination of Appellants' signs can preserve any land use, even if such preservation can be said to be a legitimate aspect of the police power.

In any event, the record shows and the Trial Court found that the Appellants have met their burden of showing that the ordinances are unreasonable and have overcome the presumption of reasonableness belonging to the state. *Goldblatt v. Town of Hempstead, supra.* Appellees of course, disagree with this contention. Thus a substantial federal question is presented for decision by this Court.

III.

Appellees rely on *Railway Express Agency v. New York* (1949), 336 U.S. 106, to sustain the ordinances. An examination of that case does not support such a position. The regulation in that case was specifically based upon the existence of traffic safety considerations and the possible difference in the nature and extent of the prohibited and permitted signs. The free speech and press issue was not involved in that case nor did the Court have before it the validity of a discrimination adversely affecting a medium for the dissemination of ideas, information and opinions.

Appellees also rely on *Packer Corp. v. Utah* (1932), 285 U.S. 105. However, in that case the ordinances in

question were reasonably related to public health, safety and morals since one of its purposes was to prevent the danger of smoking by minors, and the distinction between billboards and other types of advertising was based in large part on the fact that prohibition of billboard advertising of tobacco would not violate the Interstate Commerce clause of the Constitution, whereas a like prohibition with regard to periodicals or newspapers would have been such a violation. Of course, no such considerations are present here.

Conclusion.

Appellees have not shown that the questions set forth in Appellants' Jurisdictional Statement are not such substantial federal questions as would be proper for this Court to decide. For the foregoing reasons and the reasons set forth in Appellants' Jurisdictional Statement, there is sufficient and vital basis and cause for this Court to hear the appeal in this matter.

Respectfully submitted,

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